No. 83-2122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE STEWART and LEE ROY WARREN,
on behalf of themselves and all others similarly situated,
Petitioners,

v.

NATIONAL SHOPMEN PENSION FUND, A. S. GOODWIN,
SAMUEL SPADEA, KENNETH STEWART, DENNIS R. TONEY,
RICHARD A. SMITH, and W. J. MUSE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS
NATIONAL SHOPMEN PENSION FUND, et al.,
IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the implementation of a multiemployer pension plan provision which, pursuant to the express authorization of ERISA Section 203(a)(3)(E), provides for the cancellation of accrued benefits attributable to the precontributory service of employees of an employer that withdraws from the plan is nevertheless a violation of ERISA Section 203(c)(1)(B) because such action constitutes a change in the plan's vesting schedule.

2. Whether the cancellation of precontributory service credit pursuant to an ERISA Section 203(a)(3)(E) authorized past service disregard rule is nevertheless proscribed by ERISA Section 204(g) because such action constitutes an "amendment of the plan" which reduces accrued benefits.

PARTIES TO THE PROCEEDING

The National Shopmen Pension Fund

A. S. Goodwin, Trustee

Samuel Spadea, Trustee

Dennis R. Toney, Trustee

Richard A. Smith, Trustee

Kenneth Stewart, Trustee

W. J. Muse, Trustee

George Stewart

Lee Roy Warren

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 730 F.2d 1552 (D.D. Cir. 1984). It appears in the Appendix to the petition at pages 1a to 56a. The decision of the District Court is reported at 563 F. Supp. 776 (D.D.C. 1983) and appears in the Appendix to the petition at pages 57a to 73a.

JURISDICTIONAL STATEMENT

The decision of the court of appeals was issued on March 30, 1984 (Pet. App. A, 1a). The petition for writ of certiorari was filed on June 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

This case involves Sections 203(a)(3)(E), 203(c)(1)(B), and 204(g) of the Employee Retirement Income Security Act, as amended (ERISA) (29 U.S.C. §§ 1053(a)(3)(E)(1), 1053(c)(1)(B) and 1054(g)), and Section 411(a)(3)(E) of the Internal Revenue Code (26 U.S.C. § 411(a)(3)(E)).

STATEMENT OF THE CASE

This is an action in which Petitioners challenged an established practice among multiemployer pension funds: the voluntary granting of precontributory pension service credits to the employees of newly contributing employers *contingent* upon the employer's continued participation in the plan. Petitioners contended below that ERISA Sections 203(c)(1)(B) and 204(g) effectively prevent a plan from ever cancelling a grant of precontributory service when an employer withdraws from a plan even though ERISA Section 203(a)(3)(E) expressly authorizes such cancellations. Petitioners' position was rejected by a unanimous panel of the court of appeals below.

A. The Practice of Granting Precontributory Pension Service Credits

It has long been a common practice for multiemployer pension plans, such as the National Shopmen Pension Fund, to grant pension credits to the employees of newly participating employers for their years of service with the employer before it first joined the plan (and therefore first became obligated to make contributions on behalf of its employees). The granting of such precontribu-

tory service credits (which are sometimes called "past service credits") enables the older employees of a new contributor to receive significantly greater pension benefits than they would receive if pensions were based solely on contributory service credits (i.e., credits for service after the employer began making contributions).[1] Indeed, many workers might never receive a pension benefit of any sort were it not for the granting of precontributory service credits.

No law requires that precontributory service credits be granted. To the contrary, ERISA specifically allows plans to ignore service with an employer before the employer becomes a contributor.[2]

The granting of precontributory service is very costly to a fund. It immediately creates liabilities to the fund (since benefit obligations have come into existence) for which no funds have yet been received. Since the relationship between a contributing employer and a fund normally is one which continues for many years, funds anticipate that the unfunded liabilities which are created by the granting of past service credit will be amortized over a period of time by the stream of contributions from the employer. Indeed, one of the actuarial assumptions upon which a plan's benefit levels (which are directly related to employer contribution rates) are based presumes

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[1] Contributory service credits are sometimes referred to as "future service."

[2] Section 203(b)(1)(B) of ERISA (29 U.S.C. § 1053(b)(1)(B)) and Section 411(a)(4) of the Internal Revenue Code (29 U.S.C. § 411(a)(4)) expressly provide that years of precontributory service with an employer need not be taken into account in determining whether a participant is vested. ERISA Section 204(b)(3)(A) (29 U.S.C. § 1054(b)(3)(A)) and Internal Revenue Code Section 411(b)(3) (29 U.S.C. § 411(b)(3)) are the statutory provisions which mandate what years of service must be taken into account in determining a participant's accrued benefits. Those sections carefully avoid requiring that plans credit precontributory service.

that liabilities for precontributory service will be funded over a period of many years.[3]

So long as the employer continues to contribute to the fund, the amount of the unfunded liabilities attributable to the grant of precontributory service will decrease. But, if the employer withdraws from the plan before they are funded, the remaining liabilities must somehow be absorbed by the plan. The unfunded liabilities thus "dumped" on a plan can seriously undermine the benefit security of a plan's participants generally. The funding level of the plan as a whole may be seriously compromised. Or, planned benefit increases might have to be postponed until the "dumped" liabilities are eventually funded by contributions from the remaining employers.[4]

Multiemployer funds balance their goal of providing more meaningful benefits to older workers with their concern that the plan's financial integrity not be compromised by the "dumping" of unfunded liabilities by making grants of precontributory service credits contingent upon the continued participation of the employer in the plan.[5] Multiemployer plans, accordingly, routinely provide for the cancellation, or forfeiture, of retirement benefits attributable to precontributory service when an employer withdraws. Such a provision is often referred to as a "past service disregard rule."

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[3] Most plans adopt benefit levels embodying actuarial assumptions under which unfunded liabilities are fully amortized over a period of between 30 and 40 years.

[4] Since the enactment of the 1980 Amendments to ERISA, this dumping would have the further effect of increasing the potential withdrawal liability of all employers remaining with the Fund.

[5] Only a small percentage of employers withdraw from multiemployer plans leaving unfunded liabilities. In the case of the NSPF, only 26 of the Fund's more than 300 employers left leaving unfunded liabilities.

The practice of making the grant of precontributory service credits contingent upon the continuation of the stream of contributions from an employer is expressly authorized by ERISA. ERISA Section 203(a)(3)(E) (29 U.S.C. 1053(a)(3)(E)) and Section 411(a)(3)(E) of the Internal Revenue Code (26 U.S.C. § 411(a)(3)(E)) clearly provide that a multiemployer plan may cancel the precontributory service credits of the employees of an employer who subsequently "ceases [to make] contributions to the . . . plan." Regulations promulgated pursuant to the Internal Revenue Code also clearly authorize this practice.[6]

If multiemployer plan trustees were unable to utilize past service disregard rules to protect their funds against the dumping of unfunded liabilities, the practice of granting precontributory service to the workforces of newly participating employers would cease entirely. Without the ability to make grants of precontributory service credit contingent upon the continued stream of employer contributions, no Trustee would regard any grant of past service credit as being prudent.

This is so because no trustee can know in advance whether any particular employer will remain with the fund long enough to fully amortize precontributory service credits originally given to its employees. If the trustees' guess about an employer's longevity with the fund proves wrong, the fund must absorb unfunded liability to the detriment of the benefit security of all participants. Certainly, the trustees who guessed wrong could expect to be defendants in a lawsuit alleging that their decision to grant past service credit was imprudent and therefore a breach of their general fiduciary obligation to the fund participants.

The effect of a cessation of grants of past service credit would be devastating to older workers. The failure to

[6] 26 C.F.R. § 1.411(a)-4(b)(5); 26 CFR § 1.414(f)-1.

obtain past service credit would effectively prevent the older employees of a newly organized company from ever obtaining a meaningful pension benefit.

If multiemployer pension plans are forbidden to utilize their past service disregard rules when employers withdraw dumping unfunded liabilities, they will be required to absorb hundreds of millions of dollars for which no funding will ever be received.

B. Factual Background

The National Shopmen Pension Fund ("NSPF" or "Fund") is a multiemployer pension fund within the meaning of ERISA.[7] The Fund was established as a vehicle to fund retirement benefits for employees of participating employers who are covered by collective bargaining agreements with Shopmen Local Unions affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers (the "Union"). It is administered by a Board of Trustees consisting of three representatives of the participating employers and three representatives of the Union. The Fund currently has approximately 17,000 participants and 300 contributing employers.

There have been two Plans adopted by the Trustees since the Fund's creation. The first plan was adopted by the Trustees in 1969. Following the enactment of ERISA, the Plan was amended (in 1976) to comply with the terms of that law.

Both the 1969 and 1976 Plans were submitted to, and approved by, the Internal Revenue Service. The Internal Revenue Service approved the 1969 Plan as being in compliance with applicable provisions of the Internal Revenue Code by a letter received on September 10, 1969.

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[7] All facts are stated in the opinion of the court below and are also set forth in a Joint Stipulation of material facts which was filed with the district court.

The Internal Revenue Service approved the 1976 Plan as being in compliance with the Code, as amended by ERISA, by letter dated May 2, 1978.

The Rules and Regulations of the National Shopmen Pension Fund (the "Plan") provide that retirement benefits are paid to eligible participants on the basis of a formula that takes into account the number of years of credited service with the participant's employer and the employer's contribution rate (i.e., the amount per compensable hour that the employer pays to the Fund). For example, a participant with 25 years of credited service with a participating employer (or employers, since this plan is a multiemployer plan) who contributed at the rate of 50 cents per hour would receive, at retirement, a benefit of $400.00 per month. If the participant's years of credited service are less than 25, his or her benefits are proportionally less.

As do most multiemployer pension plans, the NSPF routinely grants pension service credits to the employees of newly participating employers for their years of service with their employer before it first joined the plan (and therefore first became obligated to make contributions on their behalf). And, consistent with multiemployer plan practice generally, the NSPF's plan contains a past service disregard rule which expressly authorizes the cancellation of benefits attributable to past service credit upon the withdrawal of an employer. Section 2.09 of the Plan provides:[8]

> (a) If an Employer's participation in the Fund with respect to a bargaining unit or group terminates, the Trustees are empowered to cancel any obligation of the Trust Fund that is maintained under the Trust Agreement with respect to that part of any pension for which a person was made eligible

[8] Plan participants receive complete copies of the Plan as well as the summary description of it mandated by ERISA Section 102 (29 U.S.C. § 1022).

on the basis of employment in such bargaining unit or group prior to the Contribution Period with respect to that unit or group. Neither shall the Trustees, Employers, nor the Union be obligated to make such payments.

It has been the consistent policy of the Trustees of the NSPF to invoke Section 2.09 *only* in cases where an employer's withdrawal has left the Plan with unfunded (i.e., "dumped") benefit obligations. And, the Trustees *only* invoke the rule to cancel benefit amounts (i.e., accrued benefits) attributable to the years of precontributory service originally granted when the employer first joined the Fund. The vesting status of participants is not affected.[9]

Thirty seven employers have withdrawn from the NSPF between the adoption of Section 2.09 and the enactment of the 1980 Multiemployer Pension Plan Amendments to ERISA. In each instance, the Trustees directed that the Martin E. Segal Co., which provides actuarial and consulting services to the Fund, prepare an actuarial report analyzing the effect of the particular withdrawal on the Fund. Each report calculated the amount of Fund assets attributable to the contributions of the employer involved as well as the amount of the Fund's liability for benefit obligations to the employer's workforce. If the report indicated that a particular termination resulted in the dumping of unfunded liabilities upon the Fund, the Trustees directed that the precontributory service of the employer's employees be cancelled. But, the Trustees would direct that cancellation of past

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[9] Prior to the decision of the Ninth Circuit in *Fentron et al. v. National Shopmen Pension Fund,* 674 F.2d 1300 (9th Cir. 1982), the Trustees' view was that they were permitted to cancel past service credit for purposes of vesting too. Following the decision in that case, the Trustees modified their prior decisions so that their implementation of Section 2.09 only cancelled past service for purposes of determining benefit amounts (accrued benefits).

service credits be *only* to the extent necessary to eliminate the unfunded liabilities. The total amount of unfunded vested liabilities which would have been dumped upon the NSPF had its Plan not contained a past service disregard rule exceeds 3 million dollars.[10]

Anchor Post Building Products, Inc. withdrew from the NSPF in September, 1980, when it permanently closed its Baltimore, Maryland plant and permanently laid off its employees. As was their consistent practice in such instances, the Trustees directed that an actuarial report on the effect of the withdrawal be prepared.

The resulting report disclosed that Anchor Post's withdrawal had left the Fund with vested benefit liabilities for which no funds would ever be received of more than $750,000. The Segal Company therefore recommended that past service credit be cancelled for all former Anchor Post employees. Even after the recommended cancellations, Segal observed, the Fund would still have unfunded vested liabilities of $430,000 dumped upon it. The Trustees followed the Segal recommendation and cancelled the past service credit of the Anchor Post group.

Plaintiffs Stewart and Warren were among the group of former Anchor Post employees whose past service credits were cancelled. Both, accordingly, suffered a substantial reduction in the amount of their monthly pension benefits. Stewart's reduced pension benefit was based only upon his 2.7 years of contributory service while Warren's was based upon his 10.4 years of contributory service.

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[10] Since the enactment of the Multiemployer Pension Plan Amendments Act of 1980, it has become less likely that Section 2.09 will need to be invoked. But, the need for the rule continues to exist. The fact that liability for unfunded benefits is statutorily imposed upon withdrawing employers does not automatically insure that it is, as a practical matter, collectible.

C. Procedural Background

1. *The Allegations of the Complaint*

Plaintiffs' Complaint alleged that the past service disregard rule contained in Section 2.09 of NSPF's Plan and the cancellation of their past service credits pursuant to it was unlawful on five grounds (each of which was set forth in a separate count). The Complaint, which also sought relief on behalf of a class of all persons adversely affected by the implementation of Section 2.09, alleged that:

1. The mere inclusion of a past service disregard rule in a pension plan is a *per se* violation of the vesting and antiforfeiture rules of Section 203 of ERISA (29 U.S.C. § 1053);

2. the cancellation of precontributory service, even if not a *per se* violation of the statute, constituted a change in Plaintiffs' vesting schedule which triggered a statutory right (pursuant to ERISA Section 203(c)(1)(B)) to elect to have their vested status determined under the vesting provisions applicable prior to the "change";

3. the cancellation constituted an improper decrease in the Plaintiffs' accrued benefits because Section 204(g) of ERISA (29 U.S.C. § 1054(g)) requires all plan "amendments" which reduce accrued benefits to be approved by the Secretary of Labor;

4. the cancellation of precontributory service credits was, in any event, arbitrary and capricious and therefore a violation of ERISA's "sole and exclusive benefit" requirement; and

5. the cancellation violated the terms of the Plan because it was in conflict with the Plan's general vesting and antiforfeiture rules.

2. *Proceedings before the District Court*

The case was submitted to the district court on cross-motions for summary judgment and a joint stipulation of

material facts. In addition to the assertions of illegality set forth in their complaint, the Plaintiffs contended that the question of whether the Trustees' cancellation of Plaintiffs' precontributory service credit constituted an improper change in their vesting schedule had already been decided against the Fund in *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 648 (9th Cir. 1982).

On May 20, 1983, the district court entered a decision and order holding that the Trustees' action in cancelling Plaintiffs' precontributory service pursuant to Section 2.09 of the Plan violated ERISA.[11] First, the court held that the cancellation was an "indirect vesting schedule amendment" and that such an "amendment" triggered a right, pursuant to ERISA Section 203(c)(1)(B), to have the "vested benefits" of affected participants calculated in accordance with the vesting scheme in effect before the "amendment."[12] In reaching this conclusion, the court held that Section 203(a)(3)(E), which specifically authorizes cancellation of past service credit, was not relevant. Second, the court ruled that the Trustees' determination to cancel Plaintiffs' past service credit was "an amendment" to the NSPF's Plan, within the meaning of ERISA Section 204(g), which reduced accrued benefits and which could not, under the provisions of that section, be implemented until approved by the Secretary of Labor. Again, the court held that Section 203(a)(3)(E) of the Act had no bearing on the matter. The court expressly declined to rule on Plaintiffs' other contentions (i.e., that the cancellation of their past credit was otherwise arbi-

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[11] The court, in a separate ruling, certified the class requested by Plaintiffs.

[12] The court rejected plaintiffs' contention that the issues before it had already been decided against the Fund in *Fentron* and therefore could not be relitigated. But, the court quoted in (a manner which showed a lack of understanding of its context) language from the Ninth Circuit.

trary and capricious), stating that such rulings were unnecessary.

D. Proceedings Before and Rulings By The Court of Appeals

The Fund and its Trustees timely appealed the district court's ruling. They then sought to obtain an automatic stay pursuant to Fed. Rule Civ. Proc. 62(d) by posting a supersedeas bond. The district court refused to grant a complete stay, however. Instead, it stayed only payment of those benefits which, under its May 20, 1983 decision, would have been due as of June 1, 1983. Holding that Rule 62(d) was inapplicable with respect to future benefit payments, the Court ordered that such benefits be in an amount which included benefits attributable to Plaintiffs' past service.

The Fund promptly sought a complete stay from the Court of Appeals. On July 27, 1983, the District of Columbia Circuit reversed the district court and directed that a complete stay be entered upon the posting of a supersedeas bond. An appeal of this latter ruling was denied by this Court (Justice Byron R. White, in chambers) on August 8, 1983.

On March 30, 1984, a unanimous panel of the District of Columbia Circuit reversed the district court's substantive rulings.

The Court held that the Trustees' application of Section 2.09 of the NSPF's Plan was not a *per se* violation of the vesting and anti-forfeiture rules of ERISA. The court, pointing to ERISA Section 203(a)(3)(E), observed that the statute expressly allowed past service disregard rules such as Section 2.09 of the NSPF's Plan. It observed too that the Trustees' implementation of the rule did not result in a change in Plaintiffs' (or any person's) vesting status. Rather, the Trustees' action only affected accrued benefits attributable to Plaintiffs'

precontributory service.[13] Implementation of the rule was not, therefore, an "amendment" affecting the vesting schedule of any participant.

The court further held that the implementation of Section 2.09 was not a "plan amendment" reducing accrued benefits which could not become effective without approval of the Secretary of Labor. The implementation of an existing plan provision which is expressly allowed by ERISA Section 203(c)(3)(E), the court ruled, is not an "amendment" within the meaning of ERISA Section 204(g) and therefore needs no prior governmental approval.

In reaching the above conclusions, the court was careful to point out that it was both *lawful and appropriate* for a pension fund to seek to protect itself, through the use of a past service cancellation rule, from the dumping of unfunded liability. Such a goal, it pointed out, was approved by the Ninth Circuit in *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 104 S.Ct. 67 (1983), and the Fourth Circuit in *Baltimore Rebuilders Inc. v. NLRB*, 611 F.2d 1372 (4th Cir. 1979), *cert. denied*, 447 U.S. 922 (1980).

The Circuit Court recognized that its ruling that past service cancellation rules, such as that of the NSPF, are authorized by ERISA did not fully dispose of this matter. It noted that Plaintiffs' allegation that the implementation of the NSPF's rule was otherwise arbitrary or capricious had not yet been considered. It therefore remanded the case for consideration of whether the rule's implementation actually was necessary to protect the Fund from the dumping of unfunded liabilities.

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[13] The Circuit Court also ruled that the Ninth Circuit's *Fentron* decision did not decide the issues raised on appeal and that the *Fentron* case, therefore, did not govern the case before it.

ARGUMENT

The decision of the court below does not conflict with any decision of any other court of appeals or of this Court. The court of appeals correctly interpreted the relevant provisions of ERISA consistent with the overall statutory scheme, applicable legislative history, decisions of this Court, and interpretations by agencies which enforce the law, as well as long established judicial principles of statutory construction. Accordingly, no further review by this Court is warranted.

1. Petitioners' assertion that there is a conflict between the decision below and that of the Ninth Circuit in *Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 648 (9th Cir. 1982), simply is not correct. As the court of appeals below noted, the two cases address significantly different legal questions. 674 F.2d at 1557. Indeed, on the ultimate question raised in this matter—whether the unilateral application of a multi-employer pension plan past service disregard rule is *per se* unlawful (as Petitioners contend)—the two circuits are in complete agreement. Both hold that such rules may be invoked to cancel past service credit for purposes of benefit accrual so long as they are not applied in an arbitrary or capricious manner. Compare the decision below with *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 104 S.Ct. 67 (1983).[14]

Petitioners contend that a conflict exists because the Ninth Circuit, in *Fentron*, ruled that the use of the NSPF's past service disregard rule in that case was a "plan amendment" while the District of Columbia Circuit ruled that the Fund's use of the rule with respect to them was not a "plan amendment." While it is true that both courts discussed the question of whether the respective

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[14] The court below itself noted that: ". . . our interpretation is fully consistent with the Ninth Circuit on this issue." *Id.* at 1565, fn. 29.

cancellations constituted a "plan amendment," the discussions were in entirely different factual, and therefore different legal, contexts. Moreover, the court below dealt with the question of what constitutes an "amendment to the plan" in the context of ERISA provisions which were not discussed or at issue in the *Fentron* litigation.

A brief discussion of the relevant statutory provisions and the respective actions taken by the Trustees in the two cases will make this point apparent.

ERISA Section 203(a)(3)(E) expressly permits multiemployer pension plans to cancel accrued benefits of participants attributable to service with their employer before it first became a contributor to the fund if that employer later withdraws from the fund. Such cancellations are exceptions (along with others described in Section 203(a)(3)) to ERISA's vesting and antiforfeiture rules. ERISA Section 203(c)(1)(B) provides that no "plan amendment" which changes the vesting schedule of any participant who has five or more years of vesting service credit may take effect unless such participants are given the option of being treated under the vesting schedule in effect prior to the amendment.

In *Fentron*, the Trustees of the NSPF implemented the plan's past service disregard rule (Section 2.09) to cancel the precontributory service credits of the Fentron employee group when that company left the plan, dumping upon it unfunded liabilities in excess of $500,000. The Trustees, following Fentron's withdrawal, used Section 2.09 to cancel past service credits both for the purpose of determining whether the Fentron employees would meet the plan's vesting rules as well as for the purpose of calculating benefit amounts accrued. No previously vested Fentron employee retained sufficient contributory service to meet the NSPF's vesting rules after the cancellation of his or her precontributory vesting service credit. Therefore, such participants were divested entirely by the Trustees' implementation of Section 2.09.

The Ninth Circuit held that the use of the Fund's past service disregard rule to entirely eliminate the vested rights of the participants was a *de facto* plan amendment changing the plaintiffs' vesting schedule and that such unilateral changes violated ERISA Section 203 (c) (1) (B). That court did *not* address the question of whether a past service disregard rule could be applied if only accrued benefits attributable to past service were cancelled (since that question, in the factual context of the case before it, was irrelevant). Indeed, the *Fentron* court never even discussed Section 203 (a) (3) (E) or its predecessor provision.[15]

The implementation of the Fund's past service disregard rule in the instant case was quite different from that in *Fentron*. As was previously noted, the Trustees, after the *Fentron* decision, only implemented Section 2.09 to cancel precontributory service for purposes of benefit accrual. Hence, when Petitioners' employer (Anchor Post) withdrew from the Fund, dumping upon it unfunded vested liabilities in excess of $750,000, Section 2.09 was used to cancel *only* accrued benefits attributable to precontributory service. Petitioners' vesting status was not affected in any way.[16]

Petitioners asserted below that the application of the NSPF's past service disregard rule to cancel their precontributory accrued benefits was no different than the action which the Ninth Circuit found to be a violation of ERISA Section 203 (c) (1) (B). They contended that they too were adversely affected by a plan amendment which unilaterally changed their vested rights.

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[15] Prior to the 1980 Amendments to ERISA, the provision authorizing past service disregard rules was contained in the Act's definition of "multiemployer plan." ERISA Section 3 (37) (29 U.S.C. § 1002 (37) (1980)).

[16] This latter fact is crucial to an understanding of the difference between *Fentron* and the instant case.

The court below recognized that this was not so. It understood that Petitioners had failed to comprehend the difference between the concepts of vested rights and accrued benefits embodied in the Act.[17] 730 F.2d at 1561-62. Citing the opinions of this Court in *Nachman Corp. v. PBGC*, 446 U.S. 359, 372-73 (1980) and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the court below noted that, in the instant case, the Trustees' use of Section 2.09:

> changes only the amount of benefits a pension receives, *not* his vested status. *It cannot be construed as an amendment to the vesting schedule.* [latter emphasis added]

"A reduction in accrued benefits, standing alone," the court pointed out, "does not affect the right to obtain benefits and thus does not affect vesting." 730 F.2d at 1562. Since the implementation of the Fund's past service disregard rule to the former Anchor Post employees had no affect on their vested rights, the court below ruled that there was *no* "amendment" to the NSPF's vesting schedule.

As the foregoing demonstrates, the rulings of the District of Columbia and Ninth Circuits are not in conflict. In *Stewart* and *Fentron*, the two circuits were faced with different legal questions. The Ninth Circuit, in *Fentron*, decided that a past service disregard rule could not be used to cancel the precontributory vesting service

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[17] "Accrued benefits" are those benefit amounts to which a fully vested plan participant would be entitled upon retirement. ERISA Section 3(23) (29 U.S.C. § 1002(23)). The concept of "vested rights" (ERISA actually uses the term "nonforfeitable rights") refers to that percentage of a participant's accrued benefits to which the participant (by virtue of his or her credited years of vesting service) has an unconditional claim. ERISA Section 3(19) (29 U.S.C. § 1002(19)). Under the rules of the NSPF's Plan, participants become 100% vested in their accrued benefits (of whatever amount) upon the attainment of 10 years of vesting service credit.

credit of participants who had previously been vested because such action would violate ERISA Section 203 (c) (1) (B). In the instant matter, the District of Columbia Circuit held that a fundamentally different action by the Trustees—the cancellation of past service credit for benefit accrual purposes only—was not a violation of that provision.

One other observation must be made about the "conflict" which Petitioners claim exists. The court of appeals below also ruled that the implementation of Section 2.09 of the Plan to cancel Petitioners' precontributory service was not a "plan amendment" within the meaning of ERISA Section 204(g). But, Section 204(g), which prohibits "amendments to [a] plan" which reduce accrued benefits unless they are first approved by the Secretary of Labor, was neither discussed nor at issue in the *Fentron* litigation. See 674 F.2d at 1306, fn. 8. Accordingly, the ruling below that the Trustees' invocation of the NSPF's past service disregard rule was not a "plan amendment" within the meaning of Section 204(g) is not in conflict with the decision of the Ninth Circuit in *Fentron* either.

2. In ruling that a past service disregard rule, such as that contained in the NSPF's plan, could lawfully be used to cancel the past service credits for purposes of benefit accrual of participants whose employer withdrew from the plan (so long as it is not used in an arbitrary or capricious manner), the court below followed the guidance which this Court gave in *Nachman* concerning the manner in which ERISA is to be construed. The court carefully looked at the specific language of the statutory provisions involved, their relationship to the overall statutory scheme, relevant legislative history, and the interpretations given to the provisions by the agencies charged with administering the law.[18] The court's consideration

[18] See 730 F.2d at 1560-65. Indeed, the IRS has promulgated a regulation in which an example demonstrating the proper use of a past service disregard rule is included. *Id.* at p. 64, fn. 27.

of those factors led it to conclude that: ". . . actions which are specifically permitted by ERISA Section 203 (a) (3), and which are carried out under authority reserved by the pension plan without actual *amendment* of the plan, are not subject to the procedures outlined in Sections 203(c) (1) (B) and 204(g)." 730 F.2d at 1565. A review of the circuit court's unanimous decision clearly shows that it properly interpreted the statute consistent with the opinions of other courts of appeals (especially that of the Ninth Circuit in *Elser, supra*) and this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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